Supreme Court, U.S.
FILED
MAY 11 1992
OFFICE OF THE CLERK

(8)

No. 91-1556

In The

Supreme Court of the United States

October Term, 1991

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members,

Petitioner,

v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

The argument made by the City of Sacramento (City) shows quite vividly why this Court should review the question of whether, *as a matter of law*, there was a sufficient nexus shown between commercial development and low-income housing needs to meet the requirements imposed by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

The City goes to great lengths to argue *its interpretation* of what its study said. Words interpreting the Keyser Marston Report (Appendix to the petition (App.), App. E),

are added to that study in a blatant effort to neutralize the study's statement that it does not " 'make the case that building construction is responsible for growth.' " Brief in Opposition at 12. The City then disregards evidence contrary to its interpretation in the declaration of David Wade. App. F.

Of course, the City carefully avoids the fact that this case was concluded below in the City's favor on *a motion for summary judgment*. Accordingly, there was never an opportunity for an evidentiary trial testing the meaning, intent, or adequacy of the study. Yet the study's barebones conclusion that commercial development is "related" to an increase in the need for low-income housing was all that was considered necessary by the Ninth Circuit. App. A-10. And, as the City readily acknowledges, that relationship, *i.e.*, "the link between new jobs and new commercial space," is shown by a finding that "new jobs could not be created absent commercial development to house those jobs." Brief in Opposition at 5-6.

Is this all that is required? To the contrary, this Court has said over and over again that there is no set formula for determining when a regulatory taking has occurred, but that each case must be examined, *ad hoc*, on its own facts for the purpose of determining whether a regulatory scheme goes so far as to result in a taking. *See, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). As this Court again recently stressed in *Yee v. City of Escondido*, No. 90-1947 (Apr. 1, 1992), regulatory takings analysis "necessarily entails complex factual assessments." Slip op. at 1. The Court emphasized that local laws regulating the use of land must be "analyzed by engaging in the 'essentially ad hoc, factual inquiries'

necessary to determine whether a regulatory taking has occurred." *Id.* at 7-8.

The City's Brief in Opposition thus necessarily struggles mightily to uphold the Ninth Circuit's decision that an adequate nexus was shown by the Keyser Marston study as a matter of law and without the benefit of a trial.

THE KEYSER MARSTON STUDY DID NOT ESTABLISH A CAUSE AND EFFECT RELATIONSHIP WHICH WOULD SHOW, AS A MATTER OF LAW, THE EXISTENCE OF A SUFFICIENT NEXUS AS REQUIRED BY NOLLAN

The City argues that the Keyser Marston study shows "that new job creation is the *primary cause* of population growth in Sacramento and that this growth is accompanied by growth in the number of low-income households." Brief in Opposition at 5 (emphasis added). Although this disregards the Wade affidavit, as well as the need for a factual trial to test any such conclusion, the Keyser Marston study actually shows no such thing.

Keyser Marston said:

> The nexus analysis illustrates how the typical cross section of employees in a commercial or industrial building will likely include a certain number of employees from very low income households. The nexus analysis does not make the case that building construction is responsible for growth. Clearly many factors come into play in determining what makes a region grow.

App. E-9. The study then concluded:

> At best, it can be said that the production of buildings to accommodate growth is but one of

> many factors that *enable or contribute* to its occurrence.

App. E-9, 10 (emphasis added).

In other words, and as acknowledged by the City, the study's premise is that new employees cannot be attracted to new businesses absent construction to house those businesses.

One is reminded of the conceptual problems addressed by law students analyzing "cause and effect" relationships in first-year tort studies. When the City concludes that there is an adequate nexus because "new jobs could not be created absent commercial development to house those jobs" (Brief in Opposition at 5-6), one can only contemplate the myriad of other things which, in a similar sense, could prevent new jobs from being created if these things did not take place. It frequently can be said that a given occurrence would not result "but for" a whole series of events leading up to it.

For example, Keyser Marston's reasoning would likewise lead to a conclusion that a person who is injured, after going to town to make a purchase, is responsible for his own injury because it would not have happened if he had not gone to town. And if that person took a bus to town, they would similarly conclude that the bus company is responsible for the injury because the person would not have gone to town were it not for the bus. And if the person were going to town to buy a Brand X hat, they would find the Brand X manufacturer to be the cause of the injury for the reason that, absent the hat, the person would have had no occasion to go to town and be injured.

Of course, there is more to "cause and effect" than this. Such reasoning totally violates the concepts

expressed by this Court in *Nollan*. Yet this is what the Ninth Circuit accepted.

This Court, in *Nollan*, sent a strong signal that restrictions placed on the use of real property, imposed unless owners are willing to concede something away, should be closely examined. They must be carefully examined to ensure that property owners, desiring to make otherwise reasonable use of their properties, are not being treated as convenient targets of opportunity to obtain private resources for public purposes. This Court in *Nollan* once again stressed the principles of "fairness and justice" which underlie the Fifth Amendment's Takings Clause. *Nollan*, 483 U.S. at 835 n.4. And the Court has just reemphasized these concepts in *Yee v. City of Escondido* stating that the issue in a regulatory takings context is whether an "ordinance unjustly imposes a burden" that should be met by the public rather than " 'disproportionately concentrated on a few persons.' " Slip op. at 9-10.

The Court in *Nollan* also said that exaction justifications require "more than an exercise in cleverness and imagination." 483 U.S. at 841. In making this point, the Court said that it viewed "the Fifth Amendment's Property Clause to be more than a pleading requirement . . . . " *Id.*

It may, of course, be true that if no one builds the structures necessary to house new businesses, or if no one does the many myriad of things needed to enhance a community's economic development, some people, including some poor people, will not move into the community. But if this is all that is required to provide a causal connection, then Judge Beezer's warning in dissent is a reality and those who help provide needed jobs can indeed be asked "to subsidize small business retailers,

child-care programs, food services and health-care delivery systems." App. A-14 (Beezer, J., dissenting). The question presented is whether investors in a community can be asked to assume responsibility for the social problems of the community merely because they are willing to invest in the community and thereby enhance its job capability base.

The true answer, of course, is that the social problem addressed by low-income housing is not the responsibility of those who provide jobs for poor people or whose actions are a factor leading to the creation of such jobs. The social problem addressed relates to the *lack of jobs* as well as to a whole host of other factors that prevent people from achieving income levels needed for affordable housing.

The requirement of a "cause and effect" relationship was carefully addressed by Justice Scalia in his dissent in *Pennell v. City of San Jose*, 485 U.S. 1, 15 (1988). Justice Scalia's views strongly influenced Judge Beezer's dissent. Judge Beezer's quotation from the *Pennell* dissent (App. A-14) need not be repeated. But it is important to note that the essence of the *Pennell* dissent was the simple "unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation." 485 U.S. at 23. And it is also important to note how that dissent stressed that the social problem of poor tenants being unable to afford reasonably priced housing "is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages . . . ." 485 U.S. at 21. In a similar manner, it is also equally clear that those who build structures to house businesses, which

enable a community to provide needed jobs, cannot be held responsible for the fact that some job applicants may need affordable housing.

As clear as the *Pennell* dissent is on this issue, the difficulty is that *it is contained in a dissent*. The majority did not find it necessary to address the issue. In light of the Ninth Circuit's decision herein, and the impact it will have across the country, this Court should now carefully address the requirements of "cause and effect" for nexus purposes. Its views should be expressed in a majority opinion.

In this regard, the City seeks to avoid the obvious implications of the grant of summary judgment by arguing that those opposing the legislative enactment of the ordinance should have presented studies in opposition at the legislative hearings held prior to its enactment. Although the City's nexus analysis was challenged at the time, it is appalling to suggest that property owners must appear at legislative hearings opposing proposed legislation that will place an undue restriction on the use of their properties. Of course, no case is cited for such a proposition. The question of whether legislation imposes an undue restriction on the use of real property, absent an owner's willingness to cave in to governmental demands, is a question for the courts invoking a proper interpretation of the Fifth Amendment's Takings Clause.

THE NINTH CIRCUIT'S OPINION EXPRESSLY REJECTED THIS COURT'S HEIGHTENED SCRUTINY REQUIREMENT

Although the *Nollan* decision nowhere uses the term "heightened scrutiny," the opinion nevertheless says that the standard of review in regulatory takings cases is different from that in due process or equal protection cases. The Court specifically rejected the "rationally related" standard used in equal protection and due process cases. *Nollan*, 483 U.S. at 834 n.3. And, as the *Nollan* opinion reflects, this Court adopted a standard quite different from that previously employed by California appellate courts. The standard of review employed in these prior cases was specifically addressed in *Nollan*, 483 U.S. at 830. As stated in the post-*Nollan* case of *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260, 1270 (1991): "Whether the new standard be described as a 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test . . . no longer controls." (Footnotes omitted.)

The City's Brief in Opposition now argues that the Ninth Circuit actually applied a heightened degree of scrutiny. *Id.* at 22. This is a gross misstatement of the opinion. The opinion speaks for itself: "[W]e are not persuaded that *Nollan* materially changes the level of scrutiny we must apply." App. A-6.

The Ninth Circuit not only pursued a "rational basis" test, it went on to approve a distinction between monetary exactions and those which involve a physical encroachment on land. App. A-6. The court said that other courts have not interpreted *Nollan* as changing the level of scrutiny in cases which do not involve a physical encroachment on land. This reasoning was later

employed by a California appellate court in *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992). There the court, relying on the Ninth Circuit's opinion herein, accordingly viewed *Nollan* as a *possessory taking* case rather than a *regulatory taking* case and concluded that heightened scrutiny applies only in a possessory takings context.

The reasoning employed in *Blue Jeans Equities* and by the Ninth Circuit here is demonstrably wrong. *Nollan* was not a possessory taking case. The Court there employed regulatory takings analysis which can be traced back through such regulatory takings cases as *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. City of New York*, 383 U.S. 104; *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), and to the case where this Court first announced its regulatory takings doctrine—*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). There is no question but that this Court was using and applying a regulatory takings analysis when it announced its heightened scrutiny requirement. Indeed, this Court, in adopting a higher level standard of review, expressly found that an assumption to the contrary in *Goldblatt v. Town of Hempstead* was "inconsistent with the formulations of our later cases." *Nollan*, 483 U.S. at 834 n.3. Yet *Goldblatt* was a *regulatory taking case*. Obviously, this Court in *Nollan* would have had no occasion to disapprove language in a regulatory taking case if it intended its analysis to be solely applicable to possessory takings cases.

This Court's decision in *Yee v. City of Escondido* may help in clarifying the true nature of the *Nollan* decision and the distinction between possessory and regulatory takings. But the Ninth Circuit's treatment of *Nollan* as a possessory taking case will remain on the books creating

massive confusion even though its decision is in major conflict with any careful reading of *Nollan* and *Yee*.

CONCLUSION

Review by this Court is particularly necessary to address the "cause and effect" relationships required to show a sufficient nexus under *Nollan* and to address the decisional conflicts in the application of *Nollan*'s heightened scrutiny requirement. For the reasons stated in the petition, and for the reasons stated above, it is respectfully requested that certiorari be granted.

DATED: May, 1992.

Respectfully submitted,

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